STATE OF MICHIGAN

COURT OF APPEALS

ANDREW D. CAULK, Plaintiff/Counter-Defendant/Appellee,	UNPUBLISHED December 10, 2013
V	No. 316434 Livingston Circuit Court Family Division
LARA T. VINLUAN, Defendant/Counter-Plaintiff/Appellant.	LC No. 10-044128-DC

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion to adopt the parties' parenting time coordinator's recommendations and denying defendant's motion to terminate the parenting time coordinator. For the reasons outlined below, we reverse and remand.

I. FACTS

Defendant-mother and plaintiff-father, who were never married, have one child together, d/o/b 12/10/09. On June 13, 2011, the parties entered into a final order by consent concerning custody and parenting time concerning the minor child. Under that order, the parties were granted joint legal custody, and defendant was granted sole physical custody. Plaintiff was awarded one overnight period of parenting time on Thursday, a six-hour block of parenting time each Saturday and Sunday, a two-hour block of parenting time on Tuesday, and the opportunity to transport the child to daycare on Monday and Wednesday morning.

The order also provided:

> The parties will engage in parenting time coordination in order to facilitate settlement of parenting time issues. The parenting time coordinator shall be Dr. Rody Yezman . . . . The parenting time coordinator will hear and fairly consider all matters that the parties submit for resolution.

* * *

> The issue of physical custody related to the parties' minor child may be reviewed by the Court upon petition if Dr. Rody Yezman, the court-appointed parenting time coordinator, recommends a modification in parenting time which could affect physical custody and that this review may be requested without the necessity of showing a change in circumstances or just cause, as required by *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003). The parties expressly agree that the recommendation of the court-appointed parenting time coordinator, Dr. Rody Yezman, regarding a modification of parenting time which could affect physical custody constitutes just cause to reconsider the custodial arrangement.

Dr. Yezman issued his first parenting time recommendation to the parties and their counsel on May 7, 2011, prior to the entry of the final consent order. The recommendation stated that "[t]here was an agreement between [defendant] and [plaintiff] in regard to increasing the frequency of overnight visits (sleep-overs) for Gabriel at [plaintiff's] house, but the particulars have not been agreed upon at the moment."

On October 24, 2011, Dr. Yezman issued a second recommendation to the parties and their counsel, which he indicated was consistent with the agreement made between the parties, adding one additional overnight to plaintiff's parenting time. The report also stated the following:

> 5. There was an agreement between [defendant] and [plaintiff] in regard to increasing the frequency of overnight visitations (sleepovers) for Gabriel at [plaintiff's] house to a third night, yet to be determined. The objective of increasing these overnight visitations is to gain a 50-50 percent arrangement for both parents with regard to legal and physical custody of Gabriel.
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> 6. It is anticipated that the third overnight visitation will commence sometime in the spring, 2012. This will be determined following a conjoint meeting of [plaintiff] and [defendant] with this parenting coordinator at that time.

On May 9, 2012, Dr. Yezman issued another recommendation, this time adding a third overnight visitation to plaintiff's parenting time schedule. The report reiterated the goal of increasing plaintiff's parenting time "to gain a 50-50 percent living arrangement for both parents," but noted that defendant did not agree with the addition of an extra overnight visitation to plaintiff's parenting time. On May 18, 2012, defendant filed a motion to terminate Dr. Yezman as parenting time coordinator. On June 8, 2012, plaintiff filed a motion to adopt the May 9, 2012, recommendation.

A hearing on the parties' motions was held before the friend of the court, after which the friend of the court recommended the dismissal of plaintiff's motion on the basis that plaintiff had not shown the proper cause or changed circumstances required to significantly change the custodial environment of the child. The friend of the court also recommended that defendant's motion to terminate Dr. Yezman as parenting time coordinator be granted, essentially because, based upon Dr. Yezman's testimony, he believed he had the authority to *make decisions* regarding the child and move the parties to what he thought would be in their best interests (a joint custody arrangement) when the consent order entered by the trial court provided him with

the authority to make only *recommendations*. The referee also noted that a parenting time coordinator was supposed to be a short-term appointment; not a life-time appointment and that the current parenting time schedule was workable but for the appointment of Dr. Yezman.

Following the friend of the court's recommendation, plaintiff filed objections and a hearing on those objections was held before the trial court. At this hearing, the trial court reviewed the record, arguments, and pleadings, but did not hear any new evidence. At the conclusion of the hearing, the trial court issued an opinion granting plaintiff's motion to adopt the parenting time coordinator's recommendation and denying defendant's motion to terminate Dr. Yezman as parenting time coordinator.

In support of its opinion, the trial court found that the recommendation only affected parenting time, not custody, and thus did not require a showing of proper cause or changed circumstances. The trial court also found that the recommendation did not change the established custodial environment. Finally, the trial court found that the parties' original consent judgment had contemplated the gradual increase of plaintiff's parenting time as the child grew older, and that previous increases in plaintiff's parenting time had not adversely affected the child. Defendant filed a motion for reconsideration, which was denied. This appeal followed.

II. ANALYSIS

Defendant argues that the trial court erred by modifying the parties' parenting time, which essentially amounting to a change in the child's established custodial environment, without complying with the requirements found in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). "Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005).

Under *Vodvarka*, a custody arrangement cannot be modified without a threshold showing of either proper cause or changed circumstances. *Id*. at 509-514; MCL 722.27(1)(c). These threshold showings are intended to "erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders. *Id*. at 509, quoting *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995). "To establish 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Vodvarka*, 259 Mich App at 512. "In order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." Id. at 513 (emphasis in original).

If such a threshold showing is made, the court must determine whether an established custodial environment exists, and if so, whether a change to that established custodial environment is in the child's best interests. MCL 722.27(1)(c). In matters involving parenting time modification where the established custodial environment of the child is not altered,

however, the *Vodvarka* definitions of "proper cause" and "change of circumstances" are inapplicable. *Shade v Wright*, 291 Mich App 17, 28; 805 NW2d 1 (2010). Instead, a more expansive definition of these terms applies, which the *Shade* court elected not to precisely define. *Id*. Thus, *whenever* a custody arrangement modification is sought, including a modification of parenting time, the moving party must demonstrate proper cause or changed circumstances. The definition of these terms merely differs depending on whether the requested change would alter the established custodial environment of the child.

The trial court is also required to make a determination regarding the existence of an established custodial environment every time it considers issues affecting custody, including modification of parenting time schedules. MCL 722.27(1)(c); *Pierron v Pierron*, 486 Mich 81, 85–86; 782 NW2d 480 (2010). This is necessarily so, as the trial court's conclusion regarding the existence of an established custodial environment determines the moving party's burden of proof. *Shade*, 291 Mich App at 23. Following the determination that proper cause or a change of circumstances exists, the trial court must decide whether modification of parenting time is in the child's best interests. *Id.;* MCL 722.27(1)(c). "When a modification would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest." *Id*. at 23. If the change would not alter an established custodial environment, the movant must establish by a preponderance of the evidence that the change is in the child's best interests. *Id.*

In the instant matter, plaintiff made no argument and the trial court made no finding that plaintiff demonstrated either proper cause or a change in circumstances. There was no testimony presented by either party before the referee or the trial court on this issue. Because the referee found that plaintiff had not presented a proper cause or change of circumstances to even consider a modification of the parenting time arrangement, the only issue the referee considered was the discharge of parenting time coordinator, Dr. Yezman. Thus, the primary testimony presented at the hearing before the referee concerned whether Dr. Yezman fulfilled his role as the parenting time coordinator by listening to each of the parties desires concerning the child and working toward a solution that met both of their desires and the best interests of the child. Again, no further testimony was taken by the trial court judge on its review. The trial court did not personally see or hear the testimony of Dr. Yezman or the limited testimony provided by either party at the referee hearing. Yet, the trial court indicated, "[l]ooking at all the factors surrounding[the child] at this point in life, the Court finds that the father has established proper cause to further go along with the recommendations of the good doctor increasing the amount of time that he is with him by one overnight [per week]. There has been no testimony presented to imply the father should not have increased parenting time . . . ."

The trial court also made no specific finding with respect to the child's established custodial environment. It did state, "[T]he Court makes a finding that adding another overnight a week does not alter physical custody, nor the otherwise custodial environment" but did not indicate whether the child's established custodial environment was with plaintiff, defendant, or with both parties. The trial court also made no findings regarding the child's best interests. In short, the trial court's record and review was inadequate.

Therefore, we conclude that the trial court made a clear legal error by modifying parenting time without first finding that proper cause or a change of circumstances existed. It

also erred in failing to make a finding regarding the child's established custodial environment. Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review. *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). In light of the fact that the issue was not addressed by the parties or the trial court during the "de novo" hearing, we conclude that the record in this case does not contain sufficient information for this Court to make a de novo determination regarding the existence of an established custodial environment. Accordingly, we reverse and remand this case to the trial court for determination whether plaintiff established proper cause or a change of circumstances to justify revisiting the trial court's previous parenting time order. If so, the trial court is to make a determination regarding the existence of an established custodial environment and the effect the proposed parenting time modification would have on such an environment if one exists and whether modification of parenting time is in the child's best interests.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens